IN THE

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HAROLD B. WILLEY, C

Supreme Court of the United States

October Term, 1954

No. 1

OLIVER BROWN, ET AL., *Appellants,*

VS.

BOARD OF EDUCATION OF TOPEKA, ET AL., *Appellees.*

No. 2

HARRY BRIGGS, JR., ET AL., *Appellants,*

VS.

R. W. ELLIOTT, ET AL., *Appellees.*

No. 3

DOROTHY E. DAVIS, ET AL., *Appellants,*

VS.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL., *Appellees.*

No. 5

FRANCIS B. GEBHART, ET AL., *Petitioners,*

VS.

ETHEL LOUISE BELTON, ET AL., *Respondents.*

APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF KANSAS, THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA, AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE, RESPECTIVELY

MEMORANDUM BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 3 AND FOR RESPONDENTS IN NO. 5 ON FURTHER REARGUMENT WITH RESPECT TO THE EFFECT OF THE COURT'S DECREE

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BLEED THROUGH

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Preliminary Statement

During oral argument question was raised concerning the class suit aspect of these cases—the extent of the class and effect of a decree on members of the class not before the Court. The Court then requested appellants to file this memorandum.

I

These Are Spurious Class Suits As Defined by Rule 23a(3) of the Federal Rules of Civil Procedure.

The complaint in each of the cases was filed by a number of Negro public school pupils enrolled in a local public school system and their parents or guardians, on behalf of themselves and an untold number of unnamed persons "similarly situated". The defendants in all of the cases were local public school authorities, *i.e.*, the local boards of education where they were incorporated bodies, the members of local school boards and local superintendents of schools. The gravamen of every complaint was that the defendants had operated and maintained the local public school system under their control and supervision on a racially segregated basis pursuant to state constitutional and/or statutory provisions; that defendants had denied both the named and unnamed minor Negro children admission to public schools set apart for white children, solely on the grounds of race or color; that both the named and unnamed minor Negro children had suffered discriminatory treatment and had been irreparably damaged thereby; and that as a result of this the named plaintiffs and all others similarly situated had been denied rights protected under the Fourteenth Amendment to the Federal Constitution. The relief sought was a declaratory judgment which decreed the unconstitution-

ality of the state policy authorizing racially segregated schools plus an injunction restraining defendants from enforcing such legislation and from making any distinction based on race or color among children attending local public schools.

In view of the foregoing summary of the complaints, it is clear that there is in each case a specification of the essentials of the third or "spurious" type of class suit defined in Rule 23(a) of the Federal Rules of Civil Procedure.[1]

In *Briggs* v. *Elliot*, the class represented includes all Negro children within the statutory age limits eligible to attend public schools and in fact attending such schools in School District No. 22 and the Summerton High School District (parts of which now form School District No. 1), Clarendon County, South Carolina (R. 4-5).[2] It also

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[1] Rule 23 of the Federal Rules of Civil Procedure provides as follows:

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the Court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

[2] The class as named in the complaint includes all the Negro children of school age in South Carolina. Obviously the class could only be that broad if the Court had before it a defendant with responsibility for all the State's public schools. Since these defendants' responsibilities are not that extensive, the class cannot be inclusive as the terms of the complaint.

includes their parents or guardians (R. 5); and both minor and adult members of the class are citizens of the United States and of the State of South Carolina and residents of Clarendon County. At the time of trial there were 959 minor members of the class (R. 50). During the recent oral argument before this Court, counsel for appellees reported that approximately 280 members of the class remain today (because of the redistricting in Clarendon County).

The class represented in *Davis v. County School Board of Prince Edward County, Virginia*, includes all Negroes within the statutory age limits to attend the public secondary schools of the Prince Edward County who possess the qualifications and satisfy all requirements for admission thereto (R. 9). Furthermore, the class here, as in the above suit, includes the parents or guardians of these children (R. 9); and all members are residents of Prince Edward County as well as citizens of the United States and the State of Virginia. The number of Negro children in the class was 450 at the time of trial (R. 81, 123), and the identical figure was given on reargument for the current population of the class.

In sum, the class represented in each case includes all Negro children attending or qualified to attend public schools in the local public school systems operated, maintained and controlled by the defendants.[3]

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[3] While the legal considerations are the same in both the Kansas and Delaware cases, we see no need to discuss these cases in this regard since all members of the class have been recognized by school authorities in those cases as entitled to benefit from adoption of a policy of school desegregation.

II

Decrees Should Embrace Unnamed Members of the Class So They May Benefit Therefrom Without the Necessity of Bringing Individual Suits.

This Court has faced the specific question of the effect of judgment in a spurious class suit in only one case, *Hansberry* v. *Lee*, 311 U. S. 32. There the question presented was whether absentee members of a class who appeared to be represented in a prior suit were bound by a judgment adverse to the interests they asserted in the second suit. The Court, reversing the Illinois Supreme Court, ruled that the state court's decision offended due process when it held that absentee members of a class were bound by a decision in a prior suit. This Court's ruling was based upon the fact that members of the class clearly had conflicting interests; and its conclusion was that where the first action was brought by some members of the class representing a single interest, other members were inadequately represented and could not, within the limits of due process, be bound by the decision. The Court did not indicate that in other circumstances, where representation was adequate, members of the class would not be bound by an adverse decision. In fact, the Court said at pp. 42-43:

> It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, . . . or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.

Subsequently, federal courts have construed the decision in *Hansberry* v. *Lee* to mean, as applied to all

spurious class suits, that all members of the class whose interests are in accord with those of the plaintiff in the original action will be bound by an adverse decision. *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (C. A. 7th 1941). Cf. *Kentucky Home Mutual Life Ins. Co.* v. *Duling*, 190 F. 2d 797, 802 (C. A. 6th 1951). Thus, there is some indication that, absent exceptional circumstances which raise questions of due process, members of a class will be bound by an adverse decision.

But even if it be assumed that unnamed members of a class are not bound by an adverse decision in the prior class action, it does not follow that such members may not avail themselves of the benefits of a favorable decision in that suit. A substantial argument may be made that members of a class should in no case be bound by an adverse decision in which they did not participate, because they have not had their day in court. But no comparable argument can be made for denying to members of a class the benefits of a decision in favor of the class. For defendant has had his day in court and he has lost. Knowing that the suit was a class action, defendant has been put on notice to defend to the hilt, and he has no more reason to relitigate the controversy against absentee members than he has to do so against the immediate plaintiff. To allow all members of the class to share in the benefits of the judgment would work no prejudice to the defendant; rather it would save him a multiplicity of separate suits. See Kalven and Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. of Chi. L. R. 684, 713 (1941).

The question of the effect of a judgment has been litigated infrequently, for in many spurious class actions, especially those where injunctive and declaratory relief was sought, the benefits of such a decision automatically inured to all of the members of the class and nothing further was necessary to enforce their rights. See *McLaurin* v. *Okla-*

homa State Regents, 339 U. S. 637; *Tureaud* v. *Board of Supervisors, Etc.,* 116 F. Supp. 248, 249, 251 (E. D. La. 1953), rev'd on other grounds, 207 F. 2d 807, vacated and remanded, 347 U. S. 971; *Gonzales* v. *Sheeley,* 96 F. Supp. 1004, 1007, 1009 (D. Ariz. 1951); *Wilson* v. *Board of Supervisors,* 92 F. Supp. 986, 988 (E. D. La. 1950), aff'd, 340 U. S 909; *Johnson* v. *Board of Trustees of University of Kentucky,* 83 F. Supp. 707, 709-710 (E. D. Ky. 1949); *Mendez* v. *Westminster School Dist.,* 64 F. Supp. 544, 545, 551 (S. D. Cal. 1946), aff'd, 161 F. 2d 774 (school cases): *Morris* v. *Williams,* 149 F. 2d 703, 704, 709 (C. A. 8th 1945); *Alston* v. *School Board of City of Norfolk,* 112 F. 2d 992, 994, 997 (C. A. 4th 1940), cert. denied, 311 U. S. 693; *Davis* v. *Cook,* 80 F. Supp. 443, 444, 452 (N. D. Ga. 1948), rev'd on other grounds, 178 F. 2d 595; *Whitmyer* v. *Lincoln Parrish School Board,* 75 F. Supp. 686, 687, 688 (W. D. La. 1948); *McDaniel* v. *Board of Public Instruction,* 39 F. Supp. 638, 639, 641 (N. D. Fla. 1941); *Mills* v. *Board of Education of Anne Arundel County,* 30 F. Supp. 245, 248, 249, 251 (D. Md. 1939) (teachers' salary cases); *Davis* v. *Schnell,* 81 F. Supp. 872, 874, 881 (S. D. Ala. 1949), aff'd, 336 U. S. 933; *Brown* v. *Baskin,* 78 F. Supp. 933, 935, 942 (E. D. S. C. 1948), aff'd, 174 F. 2d 391; *Elmore* v. *Rice,* 72 F. Supp. 516, 517, 528 (E. D. S. C. 1947), aff'd, 165 F. 2d 387, cert. denied, 333 U. S. 875, (voting cases); *Dawson* v. *Mayor and City Counsel of Baltimore,* —— F. 2d —— (C. A. 4th, decided March 4, 1955), reversing 123 F. Supp. 193; *Lopez* v. *Seccombe,* 71 F. Supp. 769, 771, 772, (S. D. Cal. 1944) (public recreation cases).

Where the question has been litigated, however, it has been held that those entitled to benefits were all who were members of the class at time of entry of final judgment. *National Hairdressers and Cosmetologists Association, Inc.* v. *Philad Co.,* 41 F. Supp. 701 (D. Del. 1941), aff'd, 129

F. 2d 1020. Other federal courts in spurious class suits have allowed members of the class to participate in the fruits of a favorable decision by intervention after the decree has been rendered, or have indicated that intervention at this time would be the proper procedure. *York* v. *Guaranty Trust Co. of New York*, 143 F. 2d 503 (C. A. 2nd 1944), rev'd on other grounds, 326 U. S. 99; *Speed* v. *Transamerica Corp.*, 100 F. Supp. 461 (D. Del. 1951); *Wilson* v. *City of Paducah*, 100 F. Supp. 116 (W. D. Ky. 1951); *Tolliver* v. *Cadahy Packing Co.*, 39 F. Supp. 337 (E. D. Tenn. 1941); *Alabama Independent Service Station Assn.* v. *Shell Petroleum Corp.*, 28 F. Supp. 386 (N. D. Ala. 1939).

The court in *York* v. *Guaranty Trust Co. of New York*, *supra*, at page 529 approached the problem in practical and reasonable terms, saying:

> Since, any suit under clause (3), a judgment will not be res judicata for or against those of the class who do not intervene, we suggest that if, after trial, the court finds against the defendant, appropriate steps be taken to notify all such note holders [other members of the class] to intervene (if they have not theretofore done so), judgment to be entered in favor only of those who do so within a reasonable time.

Moreover, still other federal courts have by way of dicta regarded a judgment in a spurious class action as benefiting all members of the class. *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84, 91 (C. A. 7th 1941); *Pennsylvania R. Co.* v. *United States*, 111 F. Supp. 80, 90 (D. N. J. 1953); *Pacific Fire Ins. Co.* v. *Reiner*, 45 F. Supp. 703 (E. D. La. 1942). See also *System Federation No. 91* v. *Reed*, 180 F. 2d 991 (C. A. 6th 1950), where the court by means of a strained construction of the character of the right enforced in a prior proceeding concluded that that suit was a "true" rather

than a "spurious" class suit and sustained a contempt proceedings instituted by an absentee member of the class on whose behalf the named plaintiffs had won a judgment enforcing seniority and promotional rights protected under the Railway Labor Act, 45 U. S. C. § 151 *et seq.*

Apart from these case authorities, the extention of the fruits of a favorable decree to unnamed members of the class would appear to follow from the mere existence of Rule 23(a)(3). If the rule were otherwise, what is denoted as a "spurious" class suit under Rule 23(a) would not be a class suit at all, but merely a device for permissive joinder. This is hardly a credible construction, for permissive joinder is amply provided for by Rule 20 of the Federal Rules. See Comment, 42 Ill. L. R. 518, 523-524 (1947); Kalven and Rosenfeld, *supra*, 8 U. of Chi. L. R. at 699. One commentator who contends that a "spurious" class suit is really only a permissive joinder device, attempts to explain its inclusion in the Federal Rules by suggesting that it also enlarged federal jurisdiction by permitting the intervention of parties who do not meet federal jurisdictional requirements. 3 Moore's Federal Practice 3448 (2nd ed. 1948.) But, apart from the fact that this would be a rather curious approach to enlarging federal jurisdiction, Rule 82 of the Federal Rules specifically states that the Rules shall not be construed to extend federal jurisdiction.

Logic does not support any interpretation which would emasculate the operation of Rule 23(a)(3). The rule provides for a situation where the "parties are too numerous" to be brought before the court. But if all in the class must become parties of record before trial if they are to share in the judgment, the rule is reduced to saying that where it is impracticable to bring all the parties before the court, they must still all be brought before the court. In this connection it should be noted that Rule 23(c) provides that no class suit defined in 23(a) may be dismissed

or compromised without the approval of the court. There would be no need for such a provision if it were not contemplated that there would be absentee members who require protection because they would be affected by the decision. Finally, as previously noted, no policy can be advanced to support such a strained construction of the Rule. A defendant, to resist participation by members of the class cannot claim that he is not liable to them, but only that they should endure the inconvenience of bringing a separate suit. Defendant is reduced to the claim that justice has been made too convenient and too complete. See Kalven and Rosenfeld, *supra,* 8 U. of Chi. L. R. at 699-701.

Conclusion

As pointed out in the recent arguments before this Court, these are spurious class suits under subsection (3) of Rule 23(a). They were treated as class actions by the courts below and they were described as such in this Court's opinion in *Brown* v. *Board of Education,* 347 U. S. 483.

The foregoing considerations also establish that the class which the individual plaintiffs brought on behalf of themselves and others similarly situated is precisely defined as to its racial, educational, residential and familial characteristics, as to the declaratory and injunctive relief sought, and as to the nature of the right asserted. Defendants have had their day in court and there is no equitable consideration which would justify any further litigation with the members of the class who were not individually named. Moreover, there is ample support in both case authority and logic for the issuance of a judgment or decree which will be beneficial to all members of the class involved in the individual cases.

The Negro children before the Court in these cases are entitled to public education on a non-segregated basis. The

only way the relief can be meaningful to them is to abolish the policy of using race as a criterion for assignment of students. Thus, the only effective decree would be one which will enjoin the use of race in the assignment of *any* pupils in the school districts involved.

Therefore, we submit that this Court should enter a decree which will order the defendants to cease the conduct held unlawful in *Brown* v. *Board of Education, supra,* and which will command them to discontinue use of race or color as a criterion for admission of students. Indeed, this is the only way that the rights of even the named plaintiffs can be protected.

Respectfully submitted,

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APPENDIX

For the convenience of the Court, we are setting out in this appendix our suggestions as to the form of decree to be entered in these cases.

Form of Decree Suggested By Appellants

Judgment reversed and cause remanded to the District Court for proceedings not inconsistent with this Court's opinion, and entry of a decree containing the following provisions:

(1) Article XI, section 7, of the Constitution of South Carolina, and section 5377 of the Code of Laws of South Carolina of 1942, and other legislative provisions of South Carolina requiring, directing or permitting defendants to maintain racial segregation in public schools in School District No. 1 of Clarendon County, South Carolina, are unconstitutional and of no force and effect;

(2) Defendants, their successors in office and their agents, employees and all other persons acting under their direction and supervision, are forthwith ordered to cease using race as a basis of determining admission, assignment or attendance in public schools in School District No. 1 of Clarendon County, South Carolina, so that at a time no later than the school term commencing in September, 1955, plaintiffs, and all others similarly situated, will be attending schools on a basis not involving race;

(3) Defendants are ordered to file with the District Court by July 15, 1955, for approval by August 15, 1955, a plan showing what changes they have made in the existing method of determining the public schools pupils attend so that race no longer will be used as a criterion;

(4) The District Court is to retain jurisdiction to make whatever further orders it deems appropriate to carry out the foregoing.

Suggested Decree to Be Entered if the Supreme Court Decides It Should Exercise Its Equity Powers to Permit An Effective Gradual Adjustment To Be Brought About From Existing Segregated Systems To Systems Not Based On Color Distinctions

Judgment reversed and cause remanded to the District Court for proceedings not inconsistent with this Court's opinion, and the entry of a decree containing the following provisions:

(1) Article XI, section 7, of the Constitution of South Carolina and section 5377 of the Code of Laws of South Carolina of 1942 and other legislative provisions of South Carolina requiring, directing or permitting defendants to maintain racial segregation in public schools in School District No. 1 in Clarendon County, South Carolina are unconstitutional and of no force and effect;

(2) Defendants, their agents, employees, successors in office and all other persons acting under their direction and supervision are forthwith ordered to cease using race as a basis of determining admission, assignment and attendance in public schools in School District No. 1, Clarendon County, South Carolina so that beginning the next school term, (i.e. September, 1955) plaintiffs and all others similarly situated will be attending school on a basis not involving race;

(3) Notwithstanding the foregoing if the defendants or other responsible officials by August 15, 1955,

(a) show the District Court that the transition to a school system not based on race or color distinctions involves such administrative factors as would cause serious and substantial dislocation in the operation of public schools should admission beginning the next school term be ordered; *and*

(b) submit a plan which, after public hearing, the District Court finds

> (i) will eliminate as soon as feasible but in no event later than September 1, 1956, racial segregation in the public schools presently subject to defendants' authority or control, in School District No. 1, Clarendon County, South Carolina; and
>
> (ii) will provide for an effective commencement of the actual transition (i.e., the admission of some Negroes to non-segregated schools) by the beginning of the next school term (September 1, 1955),

the District Court may allow defendants additional time and make such orders as are necessary to permit the effectuation of such a program.

(4) Defendants are ordered to make detailed periodic reports showing the progress made in carrying out the approved plan;

(5) The District Court under no circumstances will extend the time to effect actual transition to a school system not based on race or color distinctions beyond September, 1956.